

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 32961

NORFOLK AND WESTERN RAILWAY COMPANY—TRACKAGE RIGHTS
EXEMPTION—NORFOLK SOUTHERN RAILWAY COMPANY

Decided: August 18, 1997

On July 8, 1996, North Carolina Railroad Company (NCRR) filed a petition to revoke the notice of exemption to acquire trackage rights previously served and published in this proceeding. On August 27, 1996, United Transportation Union (UTU) also filed a petition to revoke the notice of exemption. We will deny both petitions.

BACKGROUND

Norfolk Southern Railway Company (NSR), a Class I railroad, granted to its wholly owned subsidiary, Norfolk and Western Railway Company (NW), a Class I railroad, overhead trackage rights between milepost K-27.4 at North Winston, NC, and milepost K-0.0 at Pomona, NC, and between milepost 286.8 at Pomona and milepost 284.4 at Elm (Greensboro), NC, a total distance of 29.8 miles. NW filed, on May 17, 1996, a verified notice of exemption under 49 CFR 1180.2(d)(3) and (7),¹ and a notice of the exempt transaction was served and published on June 6, 1996, 61 FR 28925. The exemption was subject to standard labor protective conditions.²

The stated purpose for the acquisition of trackage rights was to permit NW to operate its own trains between North Winston and Greensboro, thereby providing a more efficient routing for existing traffic. In its reply to UTU's petition,³ NW elaborates on the purported efficiency as follows. Traffic moving from Roanoke, VA, to Greensboro and points east was previously routed over NW's Roanoke-to-Hurt, VA line, then through Greensboro over NSR's congested Hurt-to-Linwood, NC line. There being no eastbound connection for traffic entering Greensboro from the north, this traffic was then either run down to Linwood and returned to Greensboro or, in the case of unit-train grain traffic, run around at Greensboro. An alternative, parallel routing via the less congested NW Roanoke-to-North Winston line had always been available, but would have entailed a crew change and terminal operations at North Winston for the short haul over NSR's line to Greensboro and points east. The trackage rights arrangement assertedly has made this routing feasible, allowing seamless, run-through service from Roanoke to a direct eastbound NSR connection at Greensboro.

On May 21, 1996, NW submitted an executed copy of a supplemental trackage rights agreement covering the transaction.⁴ In a letter filed July 8, 1996, NW refers to an earlier "letter of clarification," allegedly mailed to the Board on June 29, 1996, informing us that its original

¹ Acquisition by a rail carrier of trackage rights over a railroad line owned or operated by another rail carrier may be carried out only with our approval and authorization. 49 U.S.C. 11323(a)(6). Under 49 CFR 1180.2(d)(7), however, an acquisition of trackage rights is exempt as a class if it is based on a written agreement and not filed or sought in a responsive application in a rail consolidation proceeding. Under 49 CFR 1180.2(d)(3), certain transactions within a corporate family are likewise exempt as a class.

² See *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653 (1980).

³ Replies to each petition were jointly filed by NW and NSR. Except where the context requires otherwise, we will refer to the respondent as NW.

⁴ NW explained that it had only an unexecuted copy at the time the notice was filed.

consummation date of May 24, 1996, had been delayed until at least July 9, 1996, with respect to the Pomona-to-Elm segment.⁵ NW also pointed out that the segment was not owned by NSR, but was operated under lease from NCRR.⁶ On the same date that NW clarified the ownership of the line, July 8, 1996, NCRR filed its petition to revoke, alleging that NSR's failure to disclose NCRR's ownership interest constituted false and misleading information. *See* 49 CFR 1180.4(g)(1)(ii). NCRR further alleges that NSR has no right to grant trackage rights in the absence of a valid lease agreement between NCRR and NSR covering that segment.⁷ UTU also alleges that the notice of exemption contains false and misleading information with respect to NSR's ownership of the Pomona-to-Elm segment. In addition, it submits that the transaction contravenes the Rail Transportation Policy (RTP) of 49 U.S.C. 10101.⁸

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10502(d), we may revoke an exemption if we find that regulation of the transaction at issue is necessary to carry out the RTP of 49 U.S.C. 10101. Under this standard, we evaluate revocation petitions to see if regulation is needed. The party seeking revocation has the burden of proof, and petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and regulation of the transaction is necessary. *See CSX Transp., Inc.—Aban.—In Randolph County, WV*, 9 I.C.C.2d 447, 449 (1992); and *I&M Rail Link, LLC—Acquisition and Operation Exemption—Certain Lines of Soo Line Railroad Company D/B/A Canadian Pacific Railway*, STB Finance Docket No. 33326 *et al.* (STB served Apr. 2, 1997), slip op. at 6 (*I&M*). Our inquiry when revocation of an exemption is sought is similar to the analysis for determining if an exemption is proper at the outset of a proceeding, i.e., whether regulation of the transaction is necessary to carry out the RTP. This analysis focuses on the sections of the RTP related to the underlying statutory sections from which the exemption is sought. We apply this analysis in determining petitions to revoke an exemption under 49 U.S.C. 10502(d). *See Missouri Pac. R. Co.—Aban. Exempt.—Counties in Oklahoma*, 9 I.C.C.2d 18, 25 (1992); and *I&M*, slip op. at 6-7.

Under our regulations at 49 CFR 1180.4(g), we may also revoke an exemption if the notice contains false or misleading information which is brought to our attention. Here, both NCRR and UTU contend that the notice of exemption is false and misleading because it implies that NSR owns all of the line covered by the trackage rights grant when in fact NCRR owns the Pomona-to-Elm line

⁵ The Board's records do not include this earlier letter, but both UTU and NCRR acknowledge receiving copies.

⁶ NSR, NW, and Atlantic and East Carolina Railway Company, operating subsidiaries of Norfolk Southern Corporation (NS), are the exclusive operators of NCRR's 317-mile rail line between Charlotte and Morehead City, NC, under two long-term leases that expired on December 31, 1994, and January 1, 1995, respectively. A retroactive lease extension agreement (LEA) was subsequently negotiated, but shareholder ratification was judicially invalidated. Nevertheless, NSR continues to operate the line to fulfill its common carrier obligation. *See North Carolina Railroad Company—Petition to Set Trackage Compensation and Other Terms and Conditions—Norfolk Southern Railway Company, Norfolk & Western Railway Company, and Atlantic and East Carolina Railway Company*, STB Finance Docket No. 33134 (STB served May 29, 1997) (*North Carolina*).

⁷ When NCRR filed its petition to revoke, the LEA had been challenged but not yet judicially invalidated. According to NCRR, NSR was permitted under the LEA to grant trackage rights over parts of the line to other railroads, but only if it promptly notified NCRR of any such grant and subject to NCRR's rights as lessor and owner.

⁸ UTU argues that there has been no showing of any public need for NW to operate over NSR's tracks and that the only purpose of the trackage rights arrangement is to bypass collective bargaining procedures and alter provisions in labor contracts.

segment. In addition, NCRR submits that NW's subsequent attempt to cure the defect, in its letter of clarification and the supplemental trackage rights agreement, further obfuscates the ownership issue.

In the original notice of exemption, NW included the Pomona-to-Elm segment in its overall description of the trackage rights that were being granted. It specifically used the words "NSR's line of railroad" to describe the line segments that were the subject of the transaction. While this is technically incorrect with regard to the Pomona-to-Elm segment, the point was subsequently clarified⁹ and, in any event, the fact that NSR does not own the Pomona-to-Elm segment does not negate the efficacy of the notice. NSR continues legally to operate the line despite the lack of an agreement with the line's owner. The authority to operate under the lease remains in effect and cannot be discontinued until we authorize the discontinuance or approve a new agreement.¹⁰ As we stated in *North Carolina*, slip op. at 3, leases are analogous to trackage rights in terms of our jurisdiction, and we have similar statutory authority to approve them under 49 U.S.C. 11323(a)(2). NSR received such approval in *Norfolk Southern Railway Company and Atlantic and East Carolina Railway Company—Lease and Operation Exemption—North Carolina Railroad Company*, Finance Docket No. 32820 (ICC served Dec. 22, 1995) (*NSR Lease*). Contrary to NCRR's assertion that NSR lacks the authority to grant trackage rights in the absence of a valid lease agreement, the authority granted to NSR to continue operating over the line by virtue of the exemption in *NSR Lease* gives it sufficient status to avail itself of the trackage rights class exemption in the circumstances of this case.

Accordingly, NCRR's petition to revoke and UTU's petition to revoke, to the extent that it advances the same arguments as NCRR, will be denied. This action, however, does not constitute a determination of any issues with respect to the property or contractual rights of NCRR or NSR. It simply permits NSR to grant NW trackage rights over property it leases and operates.

The remainder of UTU's petition seeks revocation on the additional ground that the trackage rights arrangement has not been shown to meet any public need or further the RTP, but is instead intended to circumvent the carriers' obligation to bargain collectively over the establishment of a new interdivisional run. We disagree. First, NW has demonstrated, and UTU has not refuted, that the trackage rights operation will allow run-through operations from Roanoke to a connection at Greensboro over a favorable track orientation for further movement east over NSR. Avoidance of NSR's congested Hurt-to-Linwood line and runaround operations at Greensboro will lead to a more efficient operation responsive to the public need, and the undisputed evidence of record is that the trackage rights arrangement—eliminating a potential North Winston crew change and terminal operation—is a necessary element of this new routing.

Second, nothing in the record supports the suggestion of an ulterior motive to circumvent collective bargaining obligations. NS's director of labor relations states that the wage and benefit rates and work rules governing UTU-represented employees on NSR and NW were negotiated on the national level and are essentially uniform. He further points out that carrier and UTU representatives reached an implementing agreement [under our labor protective conditions] on June 17, 1996, that allegedly resolved all outstanding implementation issues. In any event, NW points out that the interdivisional run provisions of the applicable collective bargaining agreements do not apply to these trackage rights.

⁹ There is some dispute as to whether NW in fact clarified the ownership of the Pomona-to-Elm segment in its earlier letter of clarification and the supplemental trackage rights agreement in which NSR is still referred to as the owner of all of the lines. There can be no dispute that NW acknowledged NCRR's ownership of the Pomona-to-Elm segment in its letter to the Board filed July 8, 1996.

¹⁰ No party has alleged that the proposed grant or assignment of trackage rights by NSR expands any rights it had under the original lease or that the original lease prohibited a grant or assignment of trackage rights by the lessee to an affiliated rail carrier.

Third, UTU's reliance on the RTP is vague. It cites only elements (9) and (11)¹¹ which provide, respectively, for encouraging honest and efficient management of railroads, and fair wages and safe and suitable working conditions in the railroad industry. UTU has not shown that those RTP elements would be undermined. Moreover, in determining whether to revoke an exemption on RTP grounds, we address only those elements of the RTP that are related to the underlying statutory section (here, sections 11323-24) from which exemption was granted. *See Minnesota Comm. Ry., Inc.—Trackage Exempt.—BN RR. Co.*, 8 I.C.C.2d 31, 35-38 (1991), *aff'd sub nom. Winter v. I.C.C.*, 992 F.2d 824 (8th Cir. 1993) (*Minnesota*). Because we must grant such trackage rights applications unless they have substantial anticompetitive impacts, an RTP challenge does not lie absent a showing that the trackage rights are anticompetitive, 49 U.S.C. 11324(d).

Finally, UTU has not challenged the level of labor protection provided in the exemption. *See Minnesota*, 8 I.C.C.2d at 37. Nor has it made any showing of adverse effects on employees as a result of the trackage rights agreement. Accordingly, the remainder of UTU's petition to revoke will be denied.

It is ordered:

1. The petitions of United Transportation Union and North Carolina Railroad Company to revoke the notice of exemption served and published on June 6, 1996, are denied.
2. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

¹¹ UTU cites the equivalent elements at former 49 U.S.C. 10101a(10) and (12).